stolen property, viz.: that it was recent, exclusive and unexplained. If any one of these is not shown by the evidence, the jury cannot convict. The court, then, should instruct the jury that unless all three elements have been shown, they cannot convict. When this has been done, it is submitted that the province of the court should cease and that the jury should begin. It should be for the jury to determine from all the evidence adduced at the trial whether each of these facts is true. The jury alone should judge as to the credibility and weight to be given each portion of the evidence, and the court has no right to instruct it that any set of facts necessarily raises a presumption of guilt. This seems the view most nearly in accord with reason and it is sustained by ample authority.[17] The Supreme Court of Missouri, which, for years, had held that unexplained possession of recently stolen property raised a legal presumption of guilt, has recently overruled all previous decisions and adopted substantially the above rule.[18]

R. D. G., JR.

EFFECT OF DIVORCE UPON THE INCHOATE RIGHT OF DOWER.—In a recent case [1] in which a husband attempted to force his divorced wife to cancel her inchoate right of dower in his real estate in accordance with an agreement by which she had released him of all claims she had against him, it was held that the husband's bill must be dismissed since the inchoate right of dower is not a claim against the husband or his estate; and it was furthermore held by way of dictum that a wife who secures a divorce for her husband's fault does not thereby lose her right of dower.

With regard to this latter ruling it has generally been held in this country that in the absence of statute to the contrary, a divorce *a vinculo matrimonii* cuts off the right of dower, while this right is retained where the divorce is one *a mensa et thoro*.[2] This holding is eminently logical, for the theory underlying a divorce *a vinculo* is that the parties are no longer man and wife; consequently upon the death of the man the woman is not his widow, and, since the inchoate right of dower is not a vested right but a mere expectancy,[3] the woman cannot claim the rights belonging to a widow. On the other hand the divorce *a mensa* is no more than a mere separation. But when we see what the result of an application of the same reasoning was in England, we are at a loss to understand how our courts have come to apply it as they have.

Under the old English common law the right of dower ceased

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[17] Cooper *v.* State (1890), 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. Rep. 712; State *v.* Williams (Ore. 1921), 202 Pac. 428; Pospisil *v.* State (Neb. 1921), 182 N. W. 506; State *v.* Lippard (N. C. 1922), 111 S. E. 722; 2 Bishop, NEW CRIM. PROC. § 740 ff; 2 Wharton, CRIM. EV. (10th Ed.) § 758; 4 Wigmore, EVIDENCE, § 2513.

[18] State *v.* Swarens (Mo. 1922), 241 S. W. 934.

[1] Knapp *v.* Knapp (Ill. 1922), 135 N. E. 732.

[2] 9 R. C. L. 570; 19 C. J. 504.

[3] See dictum in Randall *v.* Kreiger (1874), 23 Wall. 137, 148.

upon a divorce *a vinculo,* but continued when the divorce was one *a mensa.*[4] But a divorce *a vinculo* was granted only for causes arising prior to the marriage, and rendered the marriage void *ab initio.*[5] The modern divorce *a vinculo* has nothing in common with this old divorce which corresponds in both scope and effect to our suit for the annulment of the marriage; it is rather akin to the old legislative divorce which was granted by special act of Parliament. This divorce recognized the validity of the marriage, but in every case in which the husband brought suit there was inserted a special clause excluding the wife from her dower, and only in such cases was there any mention made of dower.[6] When to this fact is added the fact that, after the Reformation killed the sacramental theory of marriage, a divorce *a mensa* did not prevent the remarriage of the injured party [7] the statute of bigamy passed in 1604 by the ecclesiastical convocation contained a provision that parties divorced by ecclesiastical courts should not remarry—there would seem to be a strong indication that, without the excluding clause, the dower right would not have been divested.

This latter view has seemingly been adopted by some of our courts. Probably the earliest case adhering to it is that of *Wait* v. *Wait.*[8] In this case a wife had obtained a divorce because of her husband's adultery. The court held that she was entitled to her dower for the following reasons: (1) A statute provided that if a divorce was granted in a suit brought by the husband for the wife's adultery, the wife should be deprived of dower; by implication from this statute it was held that in all cases other than that mentioned the wife should be entitled to dower under the maxim "expressio unius exclusio alterius"; (2) Since this divorce does not correspond to the old English divorce *a vinculo* but rather to the divorce *a mensa* for adultery, on the ground of precedent, the wife is entitled to her dower.

In later cases the New York court has adhered to this doctrine. In *Van Cleaf* v. *Burns,*[9] the wife procured a divorce from her husband in Illinois on the ground of his adultery and then brought suit to enforce her dower right in some New York realty. By statute in New York it was provided that a wife divorced for her misconduct should not be entitled to dower. It was held that "misconduct" referred to adultery—the only ground for divorce in New York—and therefore, since this clause but caused an exception to the general rule, the right of dower had not been lost.

In many states statutes have been passed regulating the whole subject of dower and divorce, so that the whole effect of divorce

[4] Co. Litt. 32a.
[5] 2 Scribner, DOWER, 543.
[6] 2 Scribner, DOWER, 543.
[7] Case of Marquis of Northampton (1548), 2 Burnett, REFORMATION, 155.
[8] (1850), 4 N. Y. 95.
[9] Van Cleaf *v.* Burns (1890), 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782. See Van Blaricum *v.* Larson (1913), 205 N. Y. 355, 98 N. E. 488, Ann. Cas. 1913E, 553, 41 L. R. A. (N. S.) 219,—citing Wait *v.* Wait, *supra.*

on the inchoate right of dower is settled by statute. This question is however of great importance in determining the effect to be given to foreign divorce, for in the two different views above given is probably to be found the explanation of the different effects given to such a divorce. The Supreme Court of the United States has held that a foreign divorce, obtained by the wife on account of the husband's misconduct, cuts off dower in the absence of a statute to the contrary;[10] in other jurisdictions dower is cut off only when the foreign divorce is granted for some cause which, by the *lex rei sitae,* expressly prohibits the recovery of dower.[11]

In Virginia there is no statute on the subject, and the majority view that dower is barred by a divorce *a vinculo* is held.[12] If to a divorce *a mensa* there is added a decree of perpetual separation, it is provided that the effect on property thereafter acquired shall be the same as if a divorce *a vinculo* had been granted;[13] and again that "if a wife, of her own free will, leave her husband and live in adultery, she shall be barred of her dower, unless her husband be afterwards reconciled to her, and suffer her to live with him."[14] This being the situation of our law, it would appear that the claim of good morals would be sufficient inducement to warrant the passage of an act providing that a wife divorced for her misconduct should not be entitled to dower.

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[10] Barrett *v.* Failing (1883), 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505.
[11] See cases cited in notes 9 and 10 *supra.*
[12] Cralle *v.* Cralle (1884), 79 Va. 182.
[13] Va. Code 1919, § 5112.
[14] Va. Code 1919, § 5123.